Supreme Court, U.S.
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No. 08-319

In The

# Supreme Court of the United States

HARENDA ENTERPRISES, INC.,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Issue 1: Whether the language contained in a federal EPA administrative rule addressing the proper method for testing of multi-layered building materials for asbestos content, adopted by the State of Wisconsin (through incorporation by reference), is sufficiently unclear so as to justify reliance on EPA guidance documents in construing its terms?

Issue 2: Did the Supreme Court of Wisconsin violate Petitioner Harenda's substantive due process rights by affirming the trial court's factual finding that the State of Wisconsin's test results established a regulated amount of asbestos in layered plaster even though one of Harenda's sampling events resulted in negative test results.

Issue 3: Are EPA's regulations concerning the proper testing method for the analysis of layered building materials for asbestos content unconstitutionally vague?

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## STATEMENT OF THE CASE

### Allegations in Complaint

By complaint filed July 30, 2003, in Milwaukee County Circuit Court, the State of Wisconsin ("state") alleged that defendant-appellant Harenda Enterprises, Inc., ("Harenda"), in its capacity as an "operator" of a demolition project, was liable for forfeitures, penalties, and surcharges for violating the following provisions of Wis. Admin. Code ch. NR 447:

a. Failure to adequately wet asbestos-containing material ("ACM") in violation of Wis. Admin. Code § NR 447.08(6)(a);

b. Failure to carefully lower ACM in violation of Wis. Admin. Code § NR 447.08(6)(b);

c. Failure to remove the ACM prior to demolition activity in violation of Wis. Admin. Code § NR 447.08(1);

d. Discharge of visible emissions to the outside air during the disturbance of ACM in violation of Wis. Admin. Code § NR 447.13(1); and

e. Failure to file an accurate notice of intent to renovate a facility containing ACM in violation of Wis. Admin. Code § NR 447.07(4)(k).

R. 4:5-13.

The complaint alleged that Harenda was hired by the Wisconsin Center District, the owner of the old Milwaukee Auditorium, to provide asbestos abatement consulting services for the auditorium renovation project, including the proper sampling and testing of all suspected ACM, the filing of appropriate governmental notices and documents, general asbestos abatement planning, oversight of abatement contractor activity, and air monitoring duties. The complaint further alleged that asbestos-containing plaster was improperly removed during renovation in violation of the above-cited administrative code provisions. The complaint also alleged that Harenda's failure to identify the plaster as material containing a sufficient amount of asbestos so as to render it subject to administrative rules requiring the taking of safety precautions during abatement precipitated the violations. R. 4:5-9.

## Facts Established Before the Trial Court

The trial court found that sometime prior to June 2001, the Wisconsin Center District decided to renovate a facility it owned located at 500-510 West Kilbourn Avenue in the City of Milwaukee, State of Wisconsin, that was originally constructed in 1904 and was known as the Milwaukee Auditorium. R. 71:2; Pet.-App. A-212 to A-213.

In June 2001, the Wisconsin Center District retained Harenda to conduct an inspection of the auditorium for possible ACM prior to the anticipated renovation. Harenda then undertook an inspection of the auditorium in June 2001 and in January 2002 to determine whether the facility contained ACM, and if so, the amount of the ACM. R. 71:2; Pet.-App. A-213.

ACM falls within the regulations governing proper removal methods to prevent or minimize the release of asbestos fibers into the air if suspected ACM contains "more than 1% asbestos as determined using the method specified in Appendix E to Subpart E, 40 CFR part 763, section 1." Wis. Admin. Code § NR 447.02(1)(b).

Harenda's pre-demolition inspection identified the existence of large quantities of ACM exceeding the 1% limit within the old Milwaukee Auditorium structure. R. 71:2-3; Pet.-App. A-213.

Harenda's January 2001 pre-demolition inspection included taking samples of plaster material from walls of an area of the auditorium referred to as the "second floor bowl area." Pet.-App. A-213. The laboratory test results Harenda received from its contracted testing lab concerning the plaster in the second floor bowl area indicated that none of the samples contained greater than 1% asbestos under the method that the testing laboratory used. R. 71:3; Pet.-App. A-214.

The next slate of testing occurred just prior to or during the demolition of plaster on the walls of the second story bowl area. On March 21, 2002, an inspector for the City of Milwaukee, Department of Neighborhood Services obtained a number of samples of layered plaster from the Milwaukee Auditorium for purposes of having the samples tested for asbestos content. One was a sample of multi-layered plaster from the second story bowl area of the Milwaukee Auditorium. Results of laboratory analysis (using the "polarized light microscopy" test or "PLM") of that revealed that one of the layers contained 2% asbestos. Subsequent analysis of the same sample using the more accurate "point counting" method revealed that the subject layer contained 1.75% asbestos. R. 47:276, 287; 71:3; Pet.-App. A-214 to A-215.

On the basis of the point counted test result, plaster demolition on the project was halted on April 2, 2002, because such plaster was being removed without the safety measures required by Wis. Admin. Code ch. NR 447.[1] The area where the asbestos-containing plaster was removed was extremely dusty due to near dry removal. Very little of the asbestos-containing plaster remained intact. Most had been demolished and was laying in piles in the interior of the bowl area. R. 47:276.

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[1] Such safety regulations require that ACM be carefully lowered during removal and that the material be wetted prior to removal in order to limit dust emissions into the air. Wis. Admin. Code § NR 447.08(6)(a) and (b).

Also on April 2, 2002, the same inspector for the City of Milwaukee, Department of Neighborhood Services assisted in the taking of three more samples of plaster from the second story bowl area of the old Milwaukee Auditorium. Test results (using the point counting method) for these three samples revealed that all three samples contained more than 1% asbestos. The samples contained asbestos in the following amounts: 2%, 1.25%, and 2.5%. R. 47:276-277, 287; 71:4; Pet.-App. A-215.

On April 4, 2002, representatives from the Wisconsin Department of Natural Resources ("DNR") took samples of the plaster from the second story bowl area of the old Milwaukee Auditorium. Ten samples were obtained. After the ten samples were obtained, each of the individual samples was "split" into two parts. The DNR retained ten of the split samples, and the other ten split samples were given to Harenda. R. 36:2-4. Scientific analysis of the samples retained by the DNR revealed that four of the ten samples contained more than the minimum 1% asbestos to render the sample regulated asbestos-containing material (RACM). R. 37:2, 3-7; 38:2, 3-9; 71:4-5; Pet.-App. A-216 to A-217.

Harenda also had its ten split samples independently tested. Although its chosen lab (a different lab than the one that did the initial testing and which found no regulated asbestos) did not perform an analysis using methods as accurate as those used by the State Laboratory of Hygiene or the City of Milwaukee (they did not "point count" the samples), Harenda's own lab found that five of the ten split

samples contained more than 1% asbestos. R. 35 3-24; 71:5; Pet.-App. A-217 to A-218.

Test results exceeding 1% asbestos content (from the State Laboratory of Hygiene and from the lab that tested Harenda's "split" samples) were all based on results from individual layers from multi-layered samples. R. 71:4-5; Pet.-App. A-216 to A-218.

## Trial Court's Ruling

The parties each sought judgment in their favor by filing cross-motions for summary judgment. The court denied those motions. R. 66:2. The trial court deferred determination of a purely legal issue raised by the cross-motions for summary judgment, the issue of whether EPA published "clarifications" or guidance documents would be used in interpreting the EPA rule governing the proper methodology to be used in testing multilayered samples for asbestos content. R. 66:3; 78: 17-26. During a hearing held on April 25, 2005, the trial court ruled that the EPA administrative rule on testing multi-layered samples would be construed through use of the clarifications because the EPA rule was vaguely worded. R. 78:25-26; Resp.-App. 5a-6a. In so ruling, the court determined that when any single layer of a multi-layer material contains an amount of asbestos exceeding 1%, the material is subject to the asbestos abatement safety regulations set forth in the administrative rules and must be abated in compliance with those rules. R. 78:17-26; Resp.-App.

1a-8a. A copy of the trial court's determination is attached at Resp.-App. 1a-8a.

## Trial Court's Resolution

Following the trial court's April 25, 2005, ruling, the parties recognized that the case hinged on the trial court's interpretation of the Wisconsin administrative rule describing the testing methodology to be used in testing multi-layered building material for the presence of asbestos. Consequently, the parties jointly submitted to the court for its approval proposed findings of facts and conclusions of law that were ultimately entered by the court. R. 71:1-11; Pet.-App. A-211to A-225. Based on the jointly agreed upon facts and the court's determination that the administrative rule governing the testing of multi-layered materials should be interpreted in light of the EPA clarifications, the trial court granted summary judgment in favor of the state. R. 72:2-3; Pet.-App. A-227 to A-229.

## Wisconsin Court of Appeals' Ruling

The Wisconsin Court of Appeals reversed the trial court's determination that the EPA rule regarding the testing of multi-layered materials for asbestos content should be interpreted through the clarifications. The court of appeals concluded that because the language of the rule was clear, the EPA clarifications regarding the rule should be ignored. The court of appeals held that the rule required that

the asbestos content of each layer of a multi-layered material be combined or averaged to yield an estimate of asbestos content of the whole sample. The court further ruled that it was only when this combined or averaged amount exceeded 1% asbestos did safety regulations apply to removal of the material. *State v. Harenda Enters., Inc.*, 2006 WI App 230, ¶¶ 1-9, 297 Wis. 2d 571, 724 N.W.2d 434; Pet.-App. A-58 to A-69.

**Wisconsin Supreme Court's Ruling**

In a 4 to 3 decision, the Wisconsin Supreme Court determined that the language of EPA's rule governing the testing of multi-layer building materials for asbestos was ambiguous. The court further determined that it should give deference to EPA's own interpretation of its own rule insofar as its interpretation was neither inconsistent with the rule nor was it clearly erroneous. The court also concluded that the EPA's clarifications did not constitute impermissible rule making. Finally, the court determined that the circuit court's judgment did not violate Harenda's substantive due process rights. *State v. Harenda Enters., Inc.*, 2008 WI 16, ¶ 4, 307 Wis. 2d 604, 746 N.W.2d 25; Pet.-App. A-3 to A-4.

## ARGUMENT

REASONS FOR DENYING THE PETITION:

I. REVIEW OF WISCONSIN'S ASBESTOS RULE BY THIS COURT IS UNWARRANTED BECAUSE IT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

This case involves a state supreme court's interpretation of a state administrative rule, and thus presents no federal question for this Court to resolve. The Wisconsin Supreme Court applied state law to review a trial court's determination concerning whether a state administrative rule is ambiguous and in need of further interpretation and/or clarification. While the state administrative rules involved in this case are based on a near identical federal set of administrative rules, the Wisconsin Supreme Court applied Wisconsin law to evaluate the clarity of a Wisconsin administrative rule being enforced in this case. The Wisconsin Supreme Court's decision and holding are exclusively a matter of state law, only having precedential effect in the State of Wisconsin, and then only in Wisconsin courts. The Wisconsin Supreme Court's decision in this case has no precedential effect for federal courts. The decision of the Wisconsin Supreme Court in this case has no bearing on the validity or interpretation of the identical language found in the federal rules as applied by the federal government. Because no federal issue is involved in this case, Harenda's Petition for Certiorari should be denied.

## II. THE "CONFLICT" IS NOT WORTHY OF REVIEW BY THIS COURT INSOFAR AS IT IS BETWEEN A SEVEN MEMBER STATE APPELLATE COURT OF LAST RESORT AND A SINGLE FEDERAL DISTRICT COURT JUDGE.

Harenda argues that this Court should accept review of this case because there are conflicting court decisions on the issue presented and the conflict should be resolved by this Court. Harenda claims a conflict between the Wisconsin Supreme Court's decision in this case with Judge Dana M. Sabraw's decision in *United States v. San Diego Gas & Electric Company, et. al.*, ____ F. Supp. ____, *Slip Op.* at 1-17 (S.D. Cal. 2006); P-Ap. 131-146. Of significance, however, is the fact that the supposed conflict is between the seven member Wisconsin Supreme Court and a single federal court district judge in the Southern District of California. No other state courts of last resort or federal appellate courts (or for that matter, federal district courts) have addressed this issue. This Court should deny the petition for certiorari because the question presented is not "ripe" for this Court's consideration. Only true conflicts that arise between multi-judge courts of last resort should be the subject of resolution by this busy Court. Any resolution of the conflict between the Wisconsin Supreme Court and this single Federal District Court judge should be addressed first by other lower appellate forums. Ultimately, the conflict is likely to

be resolved by those lower courts, rendering review by this Court unnecessary.

Harenda properly points out in its brief that the *San Diego Gas & Electric* case is now pending on appeal before the Circuit Court of Appeals for the Ninth Judicial Circuit. Harenda's Petition at 15, footnote 2. However, the issue regarding the proper method to be used in evaluating multi-layered samples for the presence of asbestos, whether it be the evaluation of single layers or an averaging of the layers, is *not* before that court. It was not included by the Appellant Unites States of America in its brief filed with that Court. The State has "Proposed for Lodging" a copy of the Appellant United States of America's brief for the Court's consideration pursuant to Rule 32.3.

## III. THE ISSUE RAISED BY THE PETITIONER IS NOT A PROPER SUBJECT OF REVIEW BY THIS COURT INSOFAR AS THE CONFUSION CAUSED BY THE RULE AS WRITTEN COULD BE EASILY CORRECTED BY THE EPA PROMULGATING AN AMENDED RULE.

It goes without saying that this Court should only accept for review cases that present controversies that only this Court can remedy. That is not the situation in regard to the issue Harenda is asking this Court to review.

The Wisconsin Supreme Court used EPA's clarifications to construe the meaning of the rule addressing the proper method for measuring the percentage of asbestos in multi-layer construction materials only after finding the rule ambiguous as written. *Harenda*, 307 Wis. 2d 604, ¶ 36; Pet.-App. A-18. The solution to the confusion caused by the EPA rule as written is the amendment of the rule, not review by this Court. Indeed, even if this Court would accept this case for review and subsequently rule in favor of Harenda's interpretation of the rule as written, the Court's decision's precedential effect could be quickly cut short by EPA amending its rule in conformity with its published clarification/guidance documents. *See*, "Clarification Regarding Analysis Of Multi-Layered Systems," Federal Register, Vol. 59, p. 542, January 5, 1994; Federal Register, Vol. 60, pp. 65243-44, December 19, 1995; Pet.-App. A-159 to A-165. This Court's time and efforts would best be utilized by giving it to cases that can only be resolved by this Court rather than devoting it to issues that could best be resolved by technical experts within the EPA amending its admittedly ambiguous rule.

## IV. THE CONFLICT BETWEEN THE TWO COURT DECISIONS DOES NOT PRESENT A PROPER BASIS FOR THIS COURT TO GRANT REVIEW BECAUSE THE COURT'S DECISION IN *SAN DIEGO GAS* LACKS ANALYSIS AND EXPLANATION WHEREAS THE WISCONSIN SUPREME COURT'S DECISION IN *HARENDA* IS FULLY SUPPORTED BY LEGAL REASONING AND JUSTIFICATION.

The United States Supreme Court should only grant review in "conflict of decisions" cases in instances where the issues involved have been fully litigated or "vented" in the lower courts. That is not the case here.

When the District Court for the Southern District of California issued its decision in *United States v. San Diego Gas & Electric Company, et. al.*, ____ F. Supp. ____, *Slip Op.* at 1-17 (S.D. Cal. 2006); Pet.-App. A-167 to A-195, it offered virtually no rationale or analysis regarding why it believed the language of EPA's rule regarding the testing of multi-layered materials was clear on its face. In *San Diego Gas*, the court jumped to the conclusion that the interim method described an "averaging test method" verses the "single layer method" described in the clarifications. Pet.-App. A-178 to A-180. The court never addressed the question of whether the language of the interim method was unclear. The court simply

concluded that insofar as the averaging test method (the interim method) was promulgated as a rule and since the single layer method (the clarifications) was not, that the averaging method controlled. Pet.-App. A-180 to A-186. The court did not address whether there was ambiguity regarding the term "combined" or the fact that the rule does not define the meaning of that term. The court never considered the fact that the term "average" never appears in the text of the rule. No rules of statutory construction were considered. The court did not address ambiguity regarding whether one used individual layer results or a combined result for comparison under the 1% asbestos content limit. The court did not address any safety concerns with interpreting the rule in such a manner to allow for a fictitious dilution of high concentrations of asbestos in individual layers.

In contrast, the Wisconsin Supreme Court painstakingly analyzed the language of the rule before finding the rule ambiguous and relying on the clarifications in construing its terms. The court wrote:

> ¶ 30 The focus of our inquiry is on the last sentence of the above rule. It describes two different types of testing measurements: (1) a quantification of asbestos fibers in each discrete layer, and (2) an "estimate of asbestos content for the whole sample" achieved by combining the results from discrete layers. However, it is unclear which of these measurements is relevant in determining whether material is ACM.

¶ 31 The circuit court aptly describes the ambiguity in the two main clauses of the sentence, noting that they say different things:

> [I]f they can discern discrete strata, they're supposed to come up with a number for each layer. It says that in the first clause of the final sentence that I read. And then it's got a conjunction - and - which supports [Harenda's] argument, and the second clause, which says, And then you composite or come up with a total for all the layers. And the question what does it mean?... I'm going to borrow from my early life as an English teacher. There's two clauses in one sentence, and they say two different things. They don't rule each other out, either. They say two different things, and they're joined by a linking conjunction....
>
> [I]t doesn't say whether the violation occurs in both parts of the sentence, just one, or the other. It is not

> clear. However, I think it's significant that each half of the sentence doesn't rule the other out. And so then the question becomes, is this interim method rule ... clear? No, it's not clear. And that's pretty obvious.

¶ 32 The second clause of the sentence reveals further ambiguity with respect to how to arrive at an "estimate of asbestos content for the whole sample." It directs that "and then the results of each layer are combined." However, it is unclear what is meant here by the word "combined." The State asserts that it is ambiguous, but posits that a reasonable interpretation is that the results are added together. Harenda maintains that "combined" means that the results are averaged.

¶ 33 The court of appeals, without explanation, concluded that "combining" the results from each layer requires that the percentage of asbestos for each layer be averaged. Harenda Enterprises, 297 Wis. 2d 571, ¶ 4. An obvious problem with the court of appeals' and Harenda's "plain meaning" interpretation is that the word "average" cannot be found in the text of the rule.

¶ 34 Moreover, "combine" means to "bring into a state of unity; merge." American Heritage Dictionary of the English Language, 377 (3rd ed. 1992). "Average" is defined as the "arithmetic mean." Id. at 127. However, "arithmetic mean" refers to the "value obtained by dividing the sum of a set of quantities by the number of quantities in the set." Id. at 99. Thus, averaging requires combining quantities and then dividing. The language of the rule, however, states only that quantities are to be combined.

¶ 35 Further, the language of the section leaves unclear which layers are combined to yield an estimate of the asbestos content of the whole sample. There are two plausible interpretations. The first is that only the results from each layer in which there are asbestos fibers are combined to yield an estimate of the asbestos content of the whole sample. The second interpretation is that the results from every layer identified, including those in which no asbestos fibers are identified and quantified, are combined to yield the estimate of asbestos content for the whole sample. This appears to be the interpretation embraced by the court of appeals.

¶ 36 In light of these interpretations, we reject Harenda's contention that the

> text of the rule is unambiguous. It is unclear how the first clause of the relevant sentence relates to the second clause. Likewise, the meaning of the word "combine" is uncertain, and there are competing interpretations as to what layers are to be combined to yield an estimate of asbestos content. We therefore determine that the language of § 1.7.2.1 is ambiguous.

*Harenda*, 307 Wis. 2d 604, ¶¶ 30-36; Pet.-App. A-14 to A-18.

The Wisconsin Supreme Court's opinion is fully supported by legal reasoning and rationale, while the decision of the District Court for the Southern District of California is virtually void of such analysis. This Court should decline review of this issue until such time that more than one appellate court has fully analyzed the issue and the Supreme Court is presented with a petition for certiorari on the basis of two diametrically opposed appellate court decisions whose positions are supported by concrete legal reasoning.

## V. THE WISCONSIN SUPREME COURT DID NOT HOLD THAT THE STATE'S POSITIVE TEST RESULTS WERE PRESUMPTIVELY VALID AND THAT HARENDA'S NEGATIVE TEST RESULTS WERE PRESUMPTIVELY INVALID; CONSEQUENTLY, HARENDA WAS NOT DENIED DUE PROCESS.

Harenda argues that this Court should accept review of this case because the Wisconsin Supreme Court denied it substantive due process by holding that "when the defendant's test results are negative for ACM and the government's results are positive for ACM, there is an irrebuttable presumption that the government's results are valid, and the defendant's results are not valid." Petition For Certiorari at 31.

The Wisconsin Supreme Court did not so hold. Therefore, Harenda was not denied due process and further review on this ground would be inappropriate.

In the portion of its opinion addressing Harenda's due process arguments, the Wisconsin Supreme Court merely held that based upon the agreed to and stipulated facts that the trial court had before it, the trial court did not abuse its discretion or act arbitrarily in concluding that the test results *in this case* showed that the plaster material from the disputed area contained asbestos. *Harenda*, 307 Wis. 2d 604, ¶ 76; Pet.-App. A-38.

In addressing Harenda's due process claim, the Wisconsin Supreme Court began by reviewing the elements of a violation as set forth in *U.S. v. American Nat. Can Co.*, 126 F. Supp. 2d 521, 523 (N.D. Ill. 2000). *Harenda*, 307 Wis. 2d 604, ¶ 68; Pet.-App. A-34. The Court then noted that under controlling case law, the violations that the state alleged were strict liability violations and thus the state did not have to prove negligence or intent to violate the law. *Harenda*, 307 Wis. 2d 604, ¶ 69; Pet.-App. A-34 to A35. The Court then went on to properly note that there is no requirement that the state prove some sort of defect in the owner's or operator's sampling or testing, and that liability hinged on whether the plaster material contained more than one percent asbestos. *Harenda*, 307 Wis. 2d 604, ¶¶ 71-72; Pet.-App. A-36.

The Wisconsin Supreme Court then discussed the nature of the test results the trial court had before it when it reached its conclusion that plaster was disturbed in the disputed area that contained levels of asbestos greater than one percent. The Court further noted that these were test results which were the subject of stipulation by the parties and that the parties had agreed that they were accurate within their testing method. *Harenda*, 307 Wis. 2d 604, ¶ 75; Pet.-App. A-37.

Based on the above, the Wisconsin Supreme Court rightly concluded that the test results submitted in the case were sufficient to show the presence of asbestos in the disputed area and were sufficient to show that "there was nothing arbitrary in

the circuit court's conclusion that the tests showed that the material from the disputed area was ACM." *Harenda*, 307 Wis. 2d 604, ¶¶ 75-76; Pet.-App. A-37 to A-38.

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At no time did the Wisconsin Supreme Court hold or even suggest that that there was a presumption that government tests were valid and controlling over a defendant's test results.

## VI. HARENDA WAIVED ITS RIGHT TO ARGUE ITS CLAIM THAT IT WAS DENIED DUE PROCESS BY THE WISCONSIN SUPREME COURT'S DECISION INSOFAR AS IT CONFLICTS WITH THE REQUIREMENT THAT ONLY REPRESENTATIVE SAMPLES BE ANALYZED.

Harenda argues it was denied due process by the Wisconsin Supreme Court's reliance on the EPA's clarification in interpreting its rules. Harenda contends that reliance on the clarifications was improper because allegedly EPA's clarification documents conflict with EPA's rules regarding the sampling of multilayered materials. Harenda contends that based on this conflict the Court should not have used the clarifications to address the ambiguity. This conflict, Harenda contends, provides a basis for this Court to accept its case for review.

What Harenda does not tell this Court, however, is that Harenda did not make this argument until it moved the Wisconsin Supreme Court for reconsideration of its decision. That motion was denied without opinion. Pet.-App. A-71 to A-72.

Nothing stopped Harenda from making this argument to the Wisconsin Supreme Court before the issuance of the Court's decision. As early as the time that Harenda responded to the state's Motion for Summary Judgment filed with the trial court, Harenda cited in its responsive brief federal regulations which require the sampling of all layers of a given multi-layer material when that can be accomplished. R. 42: 17-20. Yet, Harenda did not argue that the clarifications conflicted with the rules regarding sampling before the trial court. Nor did it make the argument before the Court of Appeals. Harenda also failed to make the argument when it argued the issue of whether the clarifications should be used in construing the EPA's rule when the issue was placed before the Wisconsin Supreme Court. It was only after the case was decided by the Wisconsin Supreme Court, that Harenda for the first time wanted the Wisconsin Supreme Court to consider its new argument by including it in its Motion to Reconsider. The argument could have been raised earlier. It was not. The Wisconsin courts did not overlook this issue, Harenda failed to raise it. Harenda's failure should not form the basis for this Court granting Harenda its requested relief. It is a general and well settled rule that federal appellate courts do not consider issues not passed upon below. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Hormel v.*

*Helvering*, 312 U.S. 552, 556 (1941). The same rule holds true in Wisconsin appellate courts. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727; *In Interest of A.L.W.*, 153 Wis. 2d 412, 416, n. 2, 451 N.W.2d 416 (1990).

## CONCLUSION

For the reasons set forth above, the state respectfully asks this Court to deny Harenda's Petition For Certiorari.

Dated at Madison, Wisconsin this 10th day of October, 2008.

Respectfully submitted,

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# APPENDIX

THE COURT: All right. There is going to be a trial to the Court. We've got the trial scheduled. The two motions today are from the defense. They're in the nature of motions in limine. And I'm going to be the trier of fact in this case, so it's a motion to exclude from evidence some things that will matter for the record for appellate purposes although, of course, I'm going to be aware of all these things because I've read these motions. But -- whatever.

With regard to the primary motion today, it raises a very good issue, and, you know, there were chunks of my career spent in the criminal division, and there are parts of this that are a due process kind of argument that I completely understand from the defense standpoint. This question boils down to whether the clarifications are, in effect, changes in the interim method as it was originally published in 1982. The interim method is apparently lengthy, but the portion of it that is included in the State's brief is what I will read into the record as the basis of my finding of what the interim method rule says, and it exists at Appendix E, Subpart E, 40, CFR, part 763, Section 1, Polarized Light Microscopy, and Section 1.7.2.1 reads -- and I'm going to read this whole paragraph into the record -- Bulk samples of building materials taken for the identification and quantitation of asbestos are first examined for homogeneity at low magnification with the aid of a -- and I'll spell this --
S-T-E-R-E-O-M-I-C-R-O-S-C-O-P-E. The core sample may be examined in its container or carefully removed from the container onto a glassine transfer paper or clean glass plate. If possible, note is made of the top

and bottom orientation. When discrete strata are identified, each is treated as a separate material so that fibers are first identified and quantified in that layer only, and then the results for each layer are combined to yield an estimate of asbestos content for the whole sample.

Now, I'm going to interpret this rule, or the interim method, as it is referred to, as saying two things. What it says, in my summary form, is it says you take a chunk of wall, and you can take a core sample, which I interpret to mean multi layers. You just take a chunk of the wall, and from the core sample the chemist or the lab technician is to note the top and bottom orientation, and then if they can discern discrete strata, they're supposed to come up with a number for each layer. It says that in the first clause of the final sentence that I read. And then it's got a conjunction -- and -- which supports Mr. Rattan's argument, and the second clause, which says, And then you composite or come up with a total for all the layers. And the question is what does it mean? It first said you take a read for each layer, and in the second half of that same darn sentence it says, And then you come up with a number for the whole. I'm going to borrow from my early life as an English teacher. There's two clauses in one sentence, and they say two different things. They don't rule each other out, either. They say two different things, and they're joined by a linking conjunction.

What this doesn't say, and since Mr. Rattan didn't give me anything that says it either, I presume it doesn't exist, it doesn't say whether the violation

occurs in both parts of the sentence, just one, or the other. It is not clear. However, I think it's significant that each half of the sentence doesn't rule the other out. And so then the question becomes, is this interim method rule from 1982 clear? No, it's not clear. And that's pretty obvious.

So then what do you do with these clarifications? Now, the January clarification, January of 1994, the EPA comes out with clarification of the interim method that says, in significant part, in general, when a sample consists of two or more distinct layers, or materials, each layer should be treated separately and the results reported by layer (discrete strata).

So then the case law cited by Mr. Rattan would have me analyze whether this particular clarification from January '94 is inconsistent with the first or second clause of the sentence in the interim method. And it is not inconsistent with the first clause. It says the same thing the first clause says. But it adds the reporting. It says the results reported by layer. That isn't inconsistent with the first clause because the first clause says nothing about reporting.

Then the question is, is the January '94 clarification inconsistent with the second clause? I find that it is not inconsistent with the second clause because the second clause addresses a different thing. It addresses a combining of layers, and then the results for each layer are combined to yield an estimate of asbestos. So it's not inconsistent with the

second clause of the interim method, it just addresses something different.

As to the second clarification from December of 1995 -- I'm sorry, I got the wrong date -- the second -- no, that's right -- December of '95 -- it says, in the significant portion, quote, This clarification basically stated that all multi-layered systems -- it's referring now to the January '94 clarification -- back to the quote, except for wall systems where joint compound was used only at the joints and nail holes, must be analyzed as separate materials, and the results were not allowed to be combined to determine average asbestos content continuing the policy that dilution of an asbestos-containing material is not allowed.

So, construing this sentence of the second clarification, I asked myself whether it's inconsistent with the interim method, and it is not inconsistent with the first clause of the key sentence of the interim method. The question is whether it is inconsistent with the second clause, and it -- I'm going to find today that it's not inconsistent. And the reason I find that it's not is that it is addressing something not addressed in that sentence from the interim method. It is distinguishing a kind of wall that you would not do a layer analysis on, that is, where the joint compound was used only at the joints and nail holes, and it says you must analyze the separate materials of other walls, and you can't combine.

Now, the question is whether that language -- and it's a fair argument that Mr. Rattan raises -- whether that language is inconsistent with the second

clause of the interim method. And I don't think it is because elsewhere in that December '95 EPA clarification they talk about the things that Mr. Gabrysiak argued here today. They supplied the thinking of the EPA at the time in 1982 that the interim method was passed, the thinking being that here -- and this gets into intent of the drafters -- that the lack of clarity of the original '82 rule is due to the fact that the drafters were imagining two different kinds of walls, two different kinds of sampling system -- one where discrete layers could be analyzed, one where they weren't analyzed -- and they're supplying in December of '95 the background that, hey, testers often want to save money and just do a core sample, a lump analysis, and if there isn't -- or, strike that -- if there is asbestos determined in that cheaper, faster method, well, then, you're going to have to do it anyway. If there isn't, you go back and do layers.

Now, admittedly, that rationale is not elucidated in the 1982 interim method. It isn't spelled out in there. And so I'm finding that the clarification from December of '95 is not inconsistent with the '82 rule, but I am doing that based on this Court's analysis of the intent of the drafters as well as the language of the interim method and the clarifications. I think that the proper law for the Court to follow here today is where there is a lack of clarity in the interim method, which I have found there was in this case, then the Court is to look at the language of the rule, construe it like I would a statute, look for the intent of the drafter, and in this case I am to favor a construction that would honor the drafter's intent over a construction that would defeat their intent.

These are regular rules of construction that I follow on a regular basis although I'm not usually construing rules, but, rather, statutes. And it appears to me that the drafter's intent was to come up with a method of analyzing asbestos in layered walls as well as a core sample, and that the intent of the drafters was to protect the public from a harmful substance. And viewing the language in these rules -- this rule and these clarifications -- I find that the intent is best filled by construing the clarifications in this case as clarifications.

So I'm doing two things to try to be clear for the appellate record here -- I am looking at the language of the statutes and saying that neither clarification is inconsistent with the interim method, and that the construction that I'm putting on the interim method is consistent with the drafter's intent, which I am obligated to look for and follow. I'm also -- and this is a big one here -- giving deference to the agency's own interpretation as expressed in the clarifications, the language from the December '95 clarification that I've already talked about, the fact that the labs -- EPA labs and the NVLAP labs -- follow these clarifications. These are the agencies that deal with this on a regular basis, and to the extent these are EPA labs and EPA clarifications, it is the very agency that's involved in the rule in the first place, and their own interpretation is a matter that I give deference to, and they believe this to be a clarification as is expressed in the plain language and not a change in the original rule. So I am giving deference to it, and that's part of the Court's ruling here today.

I also agree with that argument of the State that the construction of the rule as not inconsistent with the interim method enabled me to not render absurd the clarification. If they were to allow a combining of multi layers, including layers that are not of the same type, such as the example given by the State, styrofoam and plaster, that would be absurd and ridiculous. The interim method couldn't have meant that. And this clarification, especially the December '95 one, explains that in a way that is consistent with the agency's intent.

Finally, I would note that while I'm, apparently, the only reported circuit court or trial -- or appellate Court that has dealt with this issue, the State has cited an administrative decision that came up with the same conclusion. Granted, it's just an administrative decision, I'm not bound to follow it, and the defense has made the previous argument that that is an unpublished decision because by its nature administrative decisions are and can't be cited. I don't believe that that is a proper statement of the law. Administrative decisions can be cited to the Court and not be a violation of our ethical rules, and it does give me some guidance in this matter, and I have considered it for this decision today.

So, in sum, I'm finding that the clarifications are not legislative rules. I agree with the defense that if they were, they would require that -- or it would be required that the EPA follow the legislative rule-making process. It is admitted that that has not been filed in this case. So, if a subsequent review by the Court of Appeals finds I am wrong in that earlier

conclusion, it is clear, and I think the State concedes, that the rule making has not been followed in this particular case.

I would also note an argument was made by the defense that the clarifications are unenforceable for vagueness. I am specifically not finding them vague. I don't think there's anything in the interim method as spelled out in the '82 rule that's vague. It just says two different things and doesn't say which one you should report in the event you have an inconsistency between the two methods -- i.e. the layered method, where one of the layers or more is over the limit, or the combining of the whole. And so I reject that unenforceable for vagueness argument.